NO. 72-624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit.

BRIEF FOR AMICUS CURIAE JONES & LAUGHLIN STEEL CORPORATION

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INTEREST OF AMICUS CURIAE

The interest of Jones & Laughlin Steel Corporation in this case derives from the pendency of criminal informations charging twenty one counts of violating Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 ("Act of 1899"), brought against it by the United States in an action similar to that brought against the respondent, Pennsylvania Industrial Chemical Corporation ("PICCO"). Jones & Laughlin Steel Corporation is engaged in the manufacture of steel and has plants in the City of Pittsburgh and at Aliquippa, Beaver County, Pennsylvania. Each of the twenty one counts is virtually identical and charges in essence that Jones & Laughlin Steel Corporation unlawfully discharged and deposited from its two manufacturing establishments during the period from July 10, 1970 to September 8, 1970 certain industrial wastes, including iron, aluminum and compounds containing these chemicals and chlorides, phosphates and sulphates, into navigable waters of the United States in violation of Section 13 of the Act of 1899. Jones & Laughlin Steel Corporation subsequently filed a Motion to Dismiss the twenty one counts contained in the Informations. The district court deferred disposition of the Motion to Dismiss until the final resolution of the PICCO case because of the similarity of the issues in the two cases. Jones & Laughlin was granted permission to file a brief as amicus curiae and to participate in the oral arguments by the Court of Appeals below. The Solicitor General and counsel for PICCO have granted Jones & Laughlin Steel Corporation their consent to file this brief as amicus curiae in support of the respondent.

SUMMARY OF ARGUMENT

This Court has never considered in the context of a criminal case whether Section 13 of the Rivers and Harbors Act of 1899 reaches industrial wastes flowing in a liquid state into the navigable waters of the United States. The Pennsylvania Industrial Chemical Corporation, respondent here, was convicted for discharging such industrial waste into the Monongahela River even though the discharge had no adverse effect on the navigability of the River. There are admittedly several decisions of lower federal courts which support the United States, but your Amicus hastens to add that these cases have misinterpreted the opinions of this Court relating to the discharge of industrial solids and oils.

The legislative history of the Act of 1899 does not support the expansive construction of the Act urged by the United States. Otherwise, the United States has most unjustly permitted the Act of 1899 to lay dormant for over seventy years without sufficient notice to PICCO or anyone else of its possible metamorphosis into an ecology statute. Further, this Court has never considered the relationship, if any, of the federal water quality legislation to the Act of 1899. This relationship must be crucial because the discharge of PICCO which gave rise to its accusation under Section 13 of the Act of 1899 at the same time, *mirabile dictu,* complied with the federal water quality criteria.

Section 13 of the Act of 1899, together with certain other sections relative to navigation, was saved from repeal by the federal water quality legislation commencing in 1948 because of the different purposes of the

two acts. The fact that Section 13 of the Act of 1899 was saved from repeal in 1948 demonstrates how long the United States refrained from seeking the attempted judicial rewriting of the Act of 1899.

The decision by the Court of Appeals that PICCO was denied a fair trial because of the lack of any permit program pertinent to Section 13 of the Act of 1899 was fundamentally sound. Without a permit program, the Act of 1899 works an unconscionable hardship on PICCO, whose discharges into the navigable waters then met the existing federal water standards. By the United States' own admission, only five permits assertedly, but not proved, for industrial discharges have been issued since 1899. The regulations in effect in and immediately after the discharges by PICCO explicitly stated that Section 13 permits would be issued only for navigational obstructions. Thus, in the summer of 1970, PICCO had no warning of its impending conviction, much less of such possibility. PICCO's conviction must offend all concepts of fair play in this land.

ARGUMENT

The Court of Appeals Correctly Held That the Discharge by PICCO of Industrial Waste Into Navigable Waters Which Did Not Interfere With Navigation Without a Permit Under Section 13 of the Rivers and Harbors Act of 1899 Did Not Constitute a Criminal Act.

This case basically involves the further effort of the United States to resurrect a navigational statute of the 19th century in the form of a present day ecology statute. Throughout its brief, the United States, while denying any feat of legerdemain for this remarkable metamorphosis, points with obvious pride to its remarkable successes in convincing the federal lower courts of the transformation of the Act of 1899. The United States justifies its use of the Act of 1899 as an ecology statute on the grounds that Congress in 1899 mandated, and early court of appeals decisions confirmed, such a result. It decries the decision of the Court of Appeals below as an attempt to rewrite legislation, when in actuality the Government itself has been engaged in a classic example of promoting judicial legislation under a guise of interpreting the Act of 1899.

Accordingly, your Amicus respectfully suggest that this Court examine the lower court decisions which claim to draw their authority from *United States v. Republic Steel Corp.*, 362 U.S. 482, and *United States v. Standard Oil Co.*, 384 U.S. 244. These decisions of the lower courts have so misconstrued and expanded the holdings of *Republic Steel* and *Standard Oil* that as a result they bear little, if any, resemblance to their purported authorities. This Court has never decided whether the Rivers and Harbors Act of 1899 prohibits the dis-

charge into navigable waters of industrial waste where the discharge does not affect or impede navigation adversely. Yet virtually every reported case involving the discharge of industrial waste presumes this issue is well settled. For example, in the memorandum decision of *United States v. Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me. 1971), the district court, citing *Republic Steel* and *Standard Oil*, stated that:

> "It has long since been authoritatively settled that the Act prohibits *all* discharges of polluting matter (other than sewage) into navigable waters, regardless of its source or continuing nature and irrespective of its effect upon navigation." *Id.* at 688.

The cause of this fundamental error by the lower courts can be best described by a precept recorded by Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, wherein he stated at pages 399-400:

> "It is a maxim not to be disregarded, that general impressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The principle is clear; yet the lower courts, regardless of the facts in controversy and the nature of the discharge,

have routinely followed *Standard Oil* and *Republic Steel.*[1]

Two of the most significant cases cited by the United States in its brief are *La Merced,* 84 F.2d 444 (9th Cir. 1936) and *United States v. Ballard Oil Co.,* 195 F.2d 369 (2d Cir. 1952). Prior to these two cases, the case law under Section 13 was limited to factual situations which were within the orginal intendment of the Act of 1899. For example, in *United States v. Moran,* 113 F. 172 (S.D. N.Y. 1901), the defendant unlawfully dumped mud into a navigable stream, an obvious obstruction to navigation. Commencing with *La Merced,* however, the Government charged that the discharge of oil constituted refuse matter under Section 13. The same discharge, oil,

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1. Compare *United States v. Interlake Steel Corp.,* 297 F. Supp. 912 (N.D. Ill. 1969), with *United States v. Hercules, Inc.,* 335 F. Supp. 102 (D. Kan. 1971). The information in *Interlake* charged the defendant with discharging "iron particles and an oily substance into the Little Calumet River" in violation of Section 13 of the Act of 1899. The defendant did not challenge the Government's charge that iron particles and an oily substance constituted refuse matter within the meaning of Section 13. Since the discharge of iron particles and oil substances has a direct tendency to obstruct or impede navigation, *Interlake* is faithful to the holding in *Republic Steel.* On the other hand, the *Hercules* information alleged that the defendant discharged "a chemical compound NH_3 (ammonia)" into a tributary of a navigable river. Obviously, there was no allegation or proof that the discharge of ammonia affected navigation because it was discharged in a liquid state and would not settle out. Nevertheless, the court held that the discharge violated Section 13 under the rationale of *Standard Oil.* It is submitted that the *Hercules* court elevated *Standard Oil* to a higher plane than permitted by *Cohens v. Virginia.*

was also involved in *Ballard*. Although *La Merced* seems to stand for the proposition that Section 13 refuse matter need not obstruct or impede navigation, the *Ballard* decision subsequently put to rest the thought that oil was not a definite obstruction and impediment to navigation. Moreover, from any reasonable point of view, there is a vast factual and legal distinction between a discharge of raw gasoline or oil and the discharge by PICCO of industrial waste in a liquid state.[2]

As suggested above, therefore, the Government's attempt to convict PICCO of a crime must stand or fall in part on this Court's previous decisions in *Standard Oil* and *Republic Steel*. Understandably, the United States does not analyze these decisions as their precise holdings relate to the factual and legal issues presented in this case. It prefers to quote certain dicta that the Rivers and Harbors Act of 1899 does not require "a narrow, cramped reading", but that it should be interpreted "in light of the purpose to be served" (App. Brief, pp. 16-17). Notwithstanding these expansive statements, the undeniable fact remains that the Supreme Court of the United States has never ruled on a conviction under Section 13 of the Rivers and Harbors Act of 1899 based upon the discharge of industrial waste in a liquid state from a manufacturing establish-

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2. The United States failed to cite *Nicroli v. Den Norske Afrika-Og Australielinie*, 332 F.2d 651 (2d Cir. 1964), which refutes the broad construction of the Act of 1899 advanced by the Government. Moreover, another case cited by the United States, *Maier v. Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa. 1945), *aff'd*, 154 F.2d 1020 (3d Cir. 1946), supports the opposite view. The discharge there, grain residue, actually impeded navigation by filling in the channel.

ment into the navigable waters which does not adversely affect navigation.

Two matters must be readily apparent to this Court. First, the United States seeks to present this Court with a *fait accompli,* i.e., the substantial number of successful prosecutions in the recent years under the Act of 1899 compels the conclusion that its interpretation is correct (App. Brief. p. 18, fn. 16). Secondly, a number of original factual and legal issues are presented here which were not argued in *Standard Oil* and *Republic Steel,* and the social and legal climate relative to ecology and pollution has been vastly altered from that existing in 1960.

What, then, has this Court held with respect to the Rivers and Harbors Act of 1899. *United States v. Republic Steel Corp., supra,* was one for injunctive relief against three defendants wherein the defendants were charged with depositing industrial solids in the Calumet River, and the Government asked that they be enjoined from doing so and further be ordered to dredge the River to a certain depth under Sections 10 and 13 of the Rivers and Harbors Act of 1899.[3] The precise nature of the refuse matter there in controversy is extremely important here as a matter of precedential value. The refuse matter included iron oxide, metallic iron, slag, calcined limestone and graphite and was described by the lower court in 155 F. Supp. at page 450 as follows:

"33 . . . Samples taken by both the Corps of Engineers and the defendants showed that solids are

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3. Section 10 (33 U.S.C. §403) prohibits generally the creation of any unauthorized obstructions to the navigable capacity of the waters of the United States.

being deposited into the river from all sewers of the defendants. These solids are in excess of those being transported in the water at the time it is being pumped out of the river by the defendants. The solids being deposited in the Calumet River from the sewers of the defendants are being transported by suspension in the water and are not in solution or in a liquid state."

Thus the defendants were discharging solids into the River which directly obstructed navigation. The Court noted that the solids flocculated into larger units and were deposited on the River bottom. In fact, this shoaling reduced the depth of the River by as much as 9 feet (362 U.S. at 484).

On appeal, five members of this Court held that the deposit of the above-described industrial solids created an obstruction to the navigable capacity of the Calumet River in violation of Section 10, not Section 13, of the Act of 1899. The Court then held that the industrial discharges were not within the exception clause in Section 13 relating to refuse matter flowing from streets and sewers and passing therefrom in a liquid state. The Court *did not* decide that the industrial solids constituted refuse matter under Section 13 because the district court granted relief under Section 10 of the Act of 1899. Although it may be argued that a holding that the industrial solids were not within the streets and sewers exception to Section 13 is tantamount to a finding that the industrial solids constituted refuse matter, it cannot be called a definitive holding that all industrial wastes, whether solid or liquid, are refuse matter within the definition of Section 13.

Argument.

The limited scope of *Republic Steel's* holding with respect to Section 13 is readily discernible. A careful reading reveals three inherent limitations which substantially weakens its universal application in industrial waste cases. First, as pointed out above, the thrust of the Court's decision was to limit the streets and sewers exception rather than broadening the definition of refuse matter. Second, the industrial solids settled out in the river bed and directly obstructed navigation.[4] Third, the Court placed great importance on the administrative construction of the Act of 1899 by the Corps of Engineers as it related to the deposit of industrial solids in the Calumet River. The evidence showed that as early as 1909 the Corps of Engineers warned a steel company of the danger of accumulating industrial solids in the Calumet River. The District Engineer on at least 7 occasions required the solids to be removed from the River. An Act of Congress was even passed in 1935 in order to improve that River, and the accompanying House Report assumed that certain shoals would be removed by the steel company to the depth of 21 feet.[5] This history of shoaling in the Calumet River led the Court to conclude at page 490 that any doubts about the interpretation of the streets and sewers exception should be "resolved by a consistent administrative construction which refused to give immunity to industrial wastes resulting in the deposit of solids in the

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4. That the Court was chiefly concerned with the navigational impairment effect of the discharge is evident from the citation in footnote 6 at 362 U.S. 491 to HR Doc. No. 417, 69th Cong., 1st Sess., p. 9 dealing with shoaling.

5. HR Doc. No. 494, 72d Cong., 2d Sess.

very river in question".[6] Taken together, *Republic Steel* fails to support the ever expanding reach of Section 13 by the lower courts.

Six years later the Court decided *United States v. Standard Oil Co., supra.* The narrow issue there was defined by Mr. Justice Douglas as whether Section 13 refuse matter included the discharge of commercially valuable aviation gasoline in the navigable waters. The one count indictment charged that the defendant unlawfully discharged 100-octane aviation gasoline into the St. Johns River in violation of Section 13. The district court dismissed the indictment on the sole grounds that the Section 13 definition of refuse matter did not include commercially valuable oil. The district court distinguished between waste oil and commercially valuable gasoline, and held that the latter was not refuse matter. On this very narrow issue, the Court refused to accept this distinction and said at page 226 that:

> "Oil is oil and whether usable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation *and* a pollutant." (Emphasis added.)

Citing *Ballard, supra,* the Court continued at page 229:

> "The word 'refuse' in that setting . . . 'is satisfied by anything which had become waste, however useful it may earlier have been'. There is nothing more

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6. See *Federal Trade Comm'n v. Mandel Bros. Inc.,* 359 U.S. 385. By the same rule, the long settled practice by the Corps of Engineers in limiting permits under Section 13 to navigational obstructions should likewise be entitled to great weight in construing Section 13.

deserving of the label 'refuse' than oil spilled into a river."

"That seems to us to be the common sense of the matter."

The holding in *Standard Oil* is therefore limited to the discharge of commercially valuable aviation gasoline into a navigable river.

By ignoring the narrow factual situation presented to the Court, the United States seizes upon Mr. Justice Douglas' statement that the word "refuse" in Section 13 includes pollutants. Yet Mr. Justice Douglas also stated that oil "was both a menace to navigation and a pollutant", thereby indicating his concern for at least some navigational nexus. That this was Mr. Justice Douglas' intention is supported by his later statement that damage to waterways was "caused in part by obstacles which impeded navigation and in part by pollution" (384 U.S. 266).[7] Thus, in this context, the phase "and a pollutant" could easily be dropped from the holding without limiting its effect. In any event, this construction is equally as sound as that of the United States in the absence of any subsequent decisions by the Court on this point.

The nature of the industrial waste becomes exceedingly crucial when the legislative history of Section 13 is considered. The Amicus strongly disagrees with the statement in United States' brief (p. 15) that Section 13 was a codification and consolidation of earlier criminal laws designed to prohibit the discharge of matters that

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7. As in *Republic Steel,* the Court again stresses the importance of the administrative construction of Section 13 by the Corps of Engineers. 384 U.S. at 226.

cause pollution as well as to matters that obstruct navigation. To the contrary, it is respectfully submitted that any attempt to include matters that only "pollute" suggests the same kind of judicial legislation which the Government abhors in its brief.

Congress, on March 3, 1899, enacted the Rivers and Harbors Act as a codification of existing laws relating to navigable waters. Section 13 of that Act is set forth at pages 2 and 3 of United States' brief and has survived intact to this day. We agree with Mr. Justice Douglas, who stated in *Sandard Oil* that "the meaning we must give the term 'refuse' must reflect the present codification's statutory antecedents". On the other hand, the term must be limited and confined to the perimeters of the earlier statutes.

These statutory antecedents were born out of congressional reaction to the Supreme Court's decision in *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1. In *Williamette,* the Court held that there was no common law of the United States which prohibited obstructions in navigable waters. A bill (known as the Dolph Bill) was promptly introduced in Congress to nullify the *Willamette* decision. The Dolph Bill was subsequently attached (in conference) to the Rivers and Harbors Act of 1890, 26 Stat. 426. Section 6 of the Rivers and Harbors Act of 1890 provided as follows:

> "That it shall not be lawful to cast, throw, empty, or unlade, or cause, suffer, or procure to be cast, thrown, emptied, or unladen, either from or out of any ship, vessel, lighter, barge, boat, or other craft, or from the shore, pier, wharf, furnace, manufacturing establishments, or mills of any kind what-

ever, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, slag, cinders, ashes, refuse, or other waste of any kind, into any port, road, roadsted, harbor, haven, navigable river, or navigable waters of the United States *which shall tend to impede or obstruct navigation,* or to deposit or place or cause, suffer, or procure to be deposited or placed, any ballast, stone, slate, gravel, earth, rubbish, wreck, filth, slabs, edgings, sawdust, or other waste in any place or situation on the bank of any navigable waters where the same shall be liable to be washed into such navigable waters, either by ordinary or high tides, or by storms or floods, or otherwise, *whereby navigation shall or may be impeded or obstructed*: Provided, That nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used, or to be used, in or toward the building, repairing or keeping in repair any quay, pier, wharf, weir, bridge, building, or other work lawfully erected or to be erected on the banks or sides of any port, harbor, basin, channel, or navigable river, or to the casting out, unlading, or depositing of any material excavated for the improvement of navigable waters, into such places and in such manner as may be deemed by the United States officer supervising said improvement most judicious and practicable and for the best interests of such improvements, *or to prevent the depositing of any substance above mentioned* under a permit from the Secretary of War, which he is authorized

> to grant, in any place designated by him *where navigation will not be obstructed thereby.*" (Emphasis added.)

It is quite easy to spot the similarities between this Section and Section 13 of the Act of 1899, and it is immediately obvious that Section 6 of the Act of 1890 was aimed squarely at matters which "tend to impede or obstruct navigation". This should not be surprising inasmuch as *Willamette* involved the construction of a bridge across the Willamette River. In so limiting the Act of 1890, Congress was following proper legislative procedure in considering the occasion and necessity for the law and the mischief to be remedied.

Four years later, Congress enacted the Rivers and Harbors Appropriation Act of 1894, 28 Stat. 363. The Act of 1894 was directed at prohibiting deposits and obstructions in harbors and rivers for which Congress had appropriated money for improvements. Section 6 of this Act provided in pertinent part that:

> "It shall not be lawful to place, discharge, or deposit, by any process or in any manner, ballast, refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other *matter of any kind other than that flowing from streets, sewers and passing therefrom in a liquid state,* in the waters of any harbor or river of the United States, for the improvement of which money has been appropriated by Congress, elsewhere than in the limits defined and permitted by the Secretary of War. . . ." (Emphasis added.)

An examination of the matter enumerated reveals an overriding concern for solid matter which would settle out and impede or obstruct navigation. It would appear

that the addition of the catchall phrase of "any other matter of any kind" was only included out of an abundance of caution. Certainly the list of prohibited matter was not included as an all-inclusive list of solid matter which could not be deposited in navigable waters. For instance, it omitted solids like coal and gravel which would likely be deposited in navigable waters. Acid, of course, due to its highly corrosive nature, offered a special hazard to the use of rivers and harbors by vessels. Notwithstanding the changes in textual content, there is nothing to indicate by an examination of the 1894 Act that it was intended to broaden the general navigational scope of the 1890 Act.

Indeed, this conclusion was shared in 1896 by the then Attorney General of the United States. Shortly after the 1894 Act was enacted, a question arose whether certain mining and ore-washing industries were permitted to discharge ore washings into the New River in Virginia. The Attorney General's opinion was then requested whether the Secretary of War was to consider only the interests of navigation as opposed to a consideration of the matter of the discharge "injuriously affecting the fish and the water of the stream and the scenery along the same". His answer under the 1894 Act was "no" because:

> "You should, therefore, be governed only by considerations affecting the navigation of the river, and if there be none now, then by considerations which may affect future navigation, whether it is likely to become important or not, which Congress must have presumed to have in mind in authorizing the frequent and large expenditures which have

been made in the improvement of the river." 21 Op. Att'y. Gen. 305, 308 (1896).

This Opinion is clear evidence of the intent of Congress in adopting the 1894 Act, especially since it was written contemporaneously therewith. Thus, if both the 1890 Act and the 1894 Act were navigation acts, and since both acts formed the Rivers and Harbors Act of 1899, it seems unduly harsh to argue that the Rivers and Harbors Act of 1899 was intended to impose criminal sanctions for discharging matter which does not impede or obstruct navigation.

One other act relating to the New York harbors should also be mentioned, although the codification of the Rivers and Harbors Act of 1899 did not include such act. Section 1 of the Act of June 29, 1888, 25 Stat. 209, 33 U.S.C. §441, prohibits the following acts:

> "The placing, discharging, or depositing by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor."

The 1888 Act can be most helpful in construing the Act of 1894 quoted above because it prohibited the deposit of refuse or any other matter of any kind, words identical to those found in the Act of 1894 (the immediate predecessor to the Rivers and Harbors Act of 1899). Therefore, it cannot be argued that "other matter of any

kind" includes all liquid matter of any kind without regard for its prospensity to affect navigation because the Act of 1888 was entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City".

If the Act of 1888 must be read in such a way as to give full meaning to this phrase, without extending it to encompass nonobstructing navigational impediments, the Rivers and Harbors Act of 1899 should also be so read and construed. Moreover, it has been adjudicated that the Act of 1888 did not apply to discharges which do not obstruct or injuriously affect navigation. In *Warner-Quinlan Co. v. United States,* 273 F. 503, 505 (3d Cir. 1921), it was held that:

> "The statute enumerates the specific materials which, in the opinion of Congress, would ordinarily be deposited into the waters and would obstruct and injure the harbor, but made sure that it should not be obstructed or injured because of the failure to mention all the materials that might possibly be placed or deposited in the prescribed limits, and so Congress added the words, 'or any other matter of any kind.' This means, applying the maxim of ejusdem generis, matter of the same general class as before mentioned. The materials mentioned, except acid, are mostly solids, and the injury which they would do the harbor would be to obstruct it."[8]

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8. The Court in *Standard Oil* also considered the rule of ejusdem generis when it held that the enumerated matter in Section 13 included those with a pre-discharge value such as oil, and therefore refused to limit Section 13 to matters without a pre-discharge value. This again points up that the Court's primary concern was oil and not other industrial wastes.

The Acts of 1890 and 1894 (and indirectly the Act of 1888) formed the antecedent statutes to the Rivers and Harbors Act. The Chairman of the Senate Commerce Committee, Senator Frye, confirmed on the floor that the Act of 1899 was only a compilation and revision of existing general laws relating to navigable waters and that it would have no new substantive effect. In response to a question by Senator Chandler whether the Act made any changes in the existing law, Senator Frye replied that "there are not ten words changed in the entire thirteen sections". 32 Cong. Rec. 2296. Try as one will to read the Rivers and Harbors Act of 1899 broadly, its legislative history does not support a construction which extends it to industrial wastes such as discharged by PICCO.

In summary, this Court has decided that the definition of refuse matter in Section 13 encompasses industrial solids and oil. Both industrial solids and oil have an adverse effect on the navigability of our waterways, and therefore the decisions in *Republic Steel* and *Standard Oil* are supported by a strict reading of Section 13 and the underlying Congressional intent. The case below does not fall within the holding of either case because the discharges by PICCO have absolutely no effect on navigation. The Court can affirm the decision of the Court of Appeals without over-ruling its earlier decisions, and thereby can bring to a halt the dangerous alteration of an old piece of criminal legislation in an effort to make it fit modern day conditions. There are now proper statutory remedies available to the Government to safeguard our environment. Such a decision would be entirely consistent with its prior holdings and with the legislative history of Section 13. The post

Standard Oil cases have misread the Court's expressed concern for our waterways as a judicial fiat to bring American industry to task for the accumulated neglect of many persons, including the United States Government itself, without regard to constitutional fair play and due process. These decisions, albeit well-intentioned, simply cannot be reconciled with a fair reading by any reasonable person in the summer of 1970 of *Standard Oil, Republic Steel,* Section 13 and its legislative history, or the existing Governmental Regulations and practices. These very thoughts were expressed by the Court in *Standard Oil* at page 225:

> "The crisis that we face in this respect [pollution] would not, of course, warrant us in manufacturing offenses where Congress has not acted nor in stretching statutory language in a criminal field to meet strange conditions."

Argument.

THE COURT OF APPEALS PROPERLY HELD THAT THE CONVICTION OF PICCO OFFENDED DUE PROCESS BECAUSE OF THE ABSENCE OF AN ESTABLISHED PERMIT PROGRAM UNDER SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899 BY THE UNITED STATES.

In reversing the judgment of conviction of PICCO by the district court, the Court of Appeals below held that PICCO was convicted of a crime which did not exist, and that in any event the conviction violated due process. Even a cursory review of its opinion reveals the fact that the Court of Appeals was shocked, to say the least, by the Government's position. The Court of Appeals did not act unreasonably in reversing PICCO's conviction. In its opinion, it resolved all doubts concerning the navigational and streets and sewage exception issues in favor of the United States and against PICCO. Mindful of the Court's admonition in *Standard Oil* that Section 13 cannot be construed in a vacuum (384 U.S. at 225-26), the Court of Appeals could not ignore the recent events surrounding the rediscovery of Section 13 and the institution of a permit program. These events, coupled with the interplay of the Federal Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U.S.C. (1973 ed.) §§1251-1376, ("FWPCA") created a set of circumstances that the Court of Appeals concluded "may well have been unfair to the point that PICCO's conviction violated due process" (Def. App. A., p. 24a). Rather than stand Section 13 on its head, as the United States suggests, the Court of Appeals acted in the highest tradition of judicial integrity by upholding the concept of fair play in the administration of criminal statutes.

Argument.

The Court of Appeals was not the first court to be alarmed at the harshness of the Government's position vis-a-vis Section 13 of the Rivers and Harbors Act of 1899. In *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N. D. Ind. 1970), the court stated at page 358:

> "Defendant stresses the incongruity and unfairness of a regulatory scheme that provides for specific water quality standards, and yet permits the criminal prosecution of companies that spent millions of dollars in complying. The Court has considerable sympathy for defendant's position. The result *is* incongruous, and perhaps injust."

The district court in *United States v. Maplewood Poultry Co., supra,* likewise expressed sympathy with the plight of industry caused by the Government's use of Section 13 as water quality legislation.[9]

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9. In *United States v. Hercules, Inc.,* 335 F. Supp. 102 (D. Kan. 1971), the court ameliorated the gross injustice of a Section 13 conviction by dismissing nine of ten counts on the grounds that a continuing industrial discharge could not result in a separate count for each day of the discharge. Instead the court held at page 107 that the discharge was "precipitated by one impulse and with singleness of purpose". Although the district court's rationale was different from that of the Court of Appeals below, both courts shared a common adverse reaction to the Government's position. The district court found support in the Court's opinion in *United States v. Universal C.I.T. Corp.,* 344 U.S. 218, 222:

> "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

Argument.

The Court of Appeals was quick to see that PICCO's conviction under Section 13 did not make sense in light of existing water pollution statutes. It made even less sense when the non-existence of a permit program under Section 13 was considered, an issue that was not present in either *Standard Oil* or *Republic Steel.* The Court of Appeals therefore applied the traditional rules of due process and fair play to the relevant facts and laws as they existed in the summer of 1970 at the time of the discharges by PICCO.

The due process clause of the Fifth Amendment of the United States Constitution serves an important contemporary function in requiring that a statute convey a minimum warning of its impact and scope to men of reasonable intelligence so that one need not necessarily act at his own peril to know whether he is obeying the law or not obeying the law. See *Connally v. General Construction Co.,* 269 U.S. 385 and *Lanzetta v. New Jersey,* 306 U.S. 451. In part, this is an extension of the traditional canon that all penal statutes must be narrowly and strictly construed as eloquently expressed by Mr. Chief Justice Marshall in *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 at page 95:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative and not the judicial department. It is the leg-

islature, not the court, which is to define a crime, and ordain its punishment."[10]

The Rivers and Harbors Act of 1899 did not exist alone in the field of water legislation. Congress, mindful of the limited purpose of the Act of 1899 as contrasted with a program directed toward reducing stream pollution of all sorts, adopted in 1948 the FWPCA in an effort to meet the growing concern over the quality of our nation's waterways. This 1948 Act contained no express standards of water pollution, but it was the first act to recognize the absence of such standards in existing legislation. The 1948 Act preserved Section 13, together with several other sections, of the Rivers and Harbors Act of 1899 from any effect of impairment by the 1948 Act. In 1956, Congress amended the 1948 Act by adopting the Federal Water Pollution Control Act Amendments of 1956, 70 Stat. 498. The chief contribution of the 1956 Amendments was to place primary responsibility for the abatement of pollution of interstate or navigable waters on the several states. The 1948 Act was further amended by the Federal Water Pollution Control Act Amendments of 1961, 75 Stat. 204. These amendments were procedural in that they transferred the administration of the Act from the Surgeon General of the Public Health Service to the Secretary of Health, Education and Welfare.

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10. In his dissenting opinion in *Standard Oil,* Mr. Justice Harlan remarked that the rule of strict construction was not compelling in that case because the maximum penalty which could have been imposed upon Standard Oil Company was $2,500. In contrast, the maximum penalty which could be imposed on the Amicus is $52,500, hardly an insignificant sum.

In 1965, a rather comprehensive set of amendments entitled the Water Quality Act of 1965, 79 Stat. 903, was adopted. The intent of Congress in enacting the Water Quality Act of 1965 included the desire to "enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution". Congress provided for the establishment of definite water quality standards, and accepted, within limits, water quality criteria adopted by the states, as water quality standards under the FWPCA. Absent standards or inadequate standards in any state, the Secretary of the Department of the Interior was empowered to adopt standards appropriate to serve that state. The criteria of water quality to be met by standards to be adopted by any state included generally public health and welfare, enhancement of the quality of water and serving the overall purposes of the FWPCA. The Pennsylvania water quality standards for the Monongahela River were accepted by the Federal Government as the federal water quality standards under the FWPCA.[11] The Water Quality Act of 1965 further authorized the Attorney General to bring a suit on behalf of the United States to secure abatement of discharges which do not comply with the applicable water standards after due notice and hearing. The Water Quality Act of 1965 was enacted on October 2, 1965, and *Standard Oil* was argued on January 25, 1966. Thus, prior to this case, the conflict between the Act of 1899 and the FWPCA has never been fully briefed and argued before the Court.

Congress enacted another set of amendments to the FWPCA by the Water Quality Improvement Act of 1970,

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11. 18 C. F. R., Ch. V, Part 620.10.

84 Stat. 91, which dealt in large part with oil pollution. The 1970 Amendments, for the first time, declared an express legislative *policy* of the United States that there should be no discharge of oil into or upon the navigable waters of the United States.

When one views the FWPCA from its enactment in 1948 through the 1970 amendments, one realizes the comprehensive program of water pollution control which now exists. [12] Congress has now said that every person and corporation shall be responsible for the quality of the nation's water, subject to specific water quality standards and criteria adopted by the individual states. A serious problem, however, arises when any attempt is made to compromise the FWPCA program to the purposes of the Rivers and Harbors Act of 1899. The Court of Appeals stated the problem in this fashion:

> "There would appear to be something fundamentally inconsistent between the program of developing and enforcing water quality standards under the Water Quality Act and Section 407 of the Rivers and Harbors Act, if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." (Def. App. A, p. 10a).

The manifest conflict appeared in this case because at trial PICCO was prevented from proving that its discharges into the Monongahela River met the FWPCA

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12. The most recent amendments to the FWPCA, the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, confirm this argument. Although Section 4(a) of the 1972 Amendment saves pending actions under Section 13 from abatement, the Amendment will have a profound effect in improving the overall program of water quality.

standards as embodied in the water quality criteria adopted by the Commonwealth of Pennsylvania. Yet PICCO was convicted of violating the Act of 1899 when it discharged the same industrial waste. This conflict is real, not imaginary, and placed PICCO in an untenable position.

The United States denies that there is a conflict between the Acts for two reasons. First, it points to the saving clause in Section 24 of the FWPCA, as amended in 1970, 33 U.S.C. (1970 ed.) §1174, a wornout and wooden argument. It then refers to the permit provisions in Section 13.

Section 24 of the FWPCA as amended through 1970 saves the provisions of Sections 13, 14, 15, 16 and 17 of the Act of 1899. The United States suggests that the saving clause in Section 24 was added to the FWPCA as part of the Water Quality Act of 1965 because the FWPCA represents "only a partial response to the ecology problem". This argument ignores that the fact that the saving clause was part of the original enactment of the FWPCA in 1948. Furthermore, the United States concedes, as it must, that it first commenced a major enforcement program against discharges into navigable waters as are here involved in late 1969 and early 1970, more than 20 years after the saving clause was added. Although it is quite imaginative for the United States to argue the existence of extraordinary insight in Congress by enacting the Act of 1899, it is rather illogical for the United States to acknowledge that the will of Congress lay undiscovered for seventy years. The United States' argument suggests that some Rosetta Stone was found in 1969 which unraveled certain hiero-

glyphics written by Congress in 1899. Such an argument is patently absurd.

Congress had no thought in 1948 that Section 13 would be applied indiscriminately between navigation cases and ecological cases. It did not even have the benefit of the Court's interpretation of Section 13 in *Standard Oil* and *Republic Steel*. Apparently, it has never occurred to the United States that Congress intended that these sections of the Rivers and Harbors Act of 1899 should remain intact for purposes other than prohibiting discharges of matter which do not affect navigation. Congress obviously intended that Sections 13, 14 and 15 should stand unimpaired because they reached matters not within the purview of the FWPCA. The dumping of quantities of solid matter into navigable rivers is possibly a pollution problem, but more probably a navigational problem. Likewise, Section 14 is a navigational section as is Section 15, dealing with obstructions of navigable waters by vessels, floating timber and sunken vessels.[13]

The continued exception of the saving clause in the 1965 and 1970 Amendments to the FWPCA meant only that Congress did not intend to repeal a navigation statute that was never intended to cover the industrial discharges here involved, not that Congress intended that both statutes should regulate water quality. In fact, by the exception, Congress pointed out the difference between these two important statutes, one being a pollution statute and the other a navigation statute. There is no evidence whatsoever that Congress agreed

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13. Sections 16 and 17, 33 U.S.C. §§411-413 are enforcement provisions.

with the absurd interpretation of Section 13 by the lower courts.[14]

The Government's second argument relates to the permit provisions of Section 13. Although the Court of Appeals found that the permit provision of the Act of 1899 brought Section 13 of that Act into reconciliation with the FWPCA, it utterly rejected the Government's contention that the non-existence of a permit program in the summer of 1970 was immaterial to the offense charged. The permit provision of Section 13 authorizes the Chief of Engineers to issue permits for the deposit of refuse matter into navigable waters whenever in his judgment anchorage and navigation will not be injured. The United States contends that there is no conflict between the FWPCA and the Rivers and Harbors Act of 1899 because a person may be exonerated from any criminal charges under the Rivers and Harbors Act if he obtains a permit to discharge matter which is, subsequent to December, 1970, in compliance with the FWPCA.[15]

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14. The broad rewriting of the FWPCA in 1972 strongly confirms the argument that Congress did not agree that Section 13 was enacted to regulate water pollution.

15. At least one district court has construed the permit provision of Section 13. In *United States v. United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970), the defendant was charged with discharging a red-brown sediment and an oily substance. The district court at page 357 offered this bit of circuitous reasoning:

> "Moreover, if only deposits forbidden by the Act were those which obstruct navigation, the final

We believe that the Court will take judicial notice of the absence of a permit program under Section 13 prior to December 25, 1970. On that date, President Nixon announced Executive Order No. 11574. 35 Fed. Register 19627. This Executive Order stated that a permit program would be initiated under Section 13 of the Act of 1899 and that such permits would be issued upon compliance with applicable Federal water quality standards. In April of 1971, the Corps of Engineers announced the adoption of regulations governing the is-

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> proviso [of Section 13] would make no sense. Under that proviso, the Secretary of the Army can permit otherwise illegal deposits if the Chief of Engineers finds that anchorage and navigation will not be impaired. If defendant's interpretation were correct, in any given case a permit would either be unnecessary — since non-obstructing deposits were never forbidden in the first place — or unobtainable — since the Secretary has no power to permit deposits that obstruct navigation. The final proviso makes sense only if the Act forbids deposits that pollute, as well as those which directly affect navigability."

This rationale of the court proves entirely too much and is internally inconsistent. True, Congress did not intend that the Act of 1899 should apply to matters which had no tendency to adversely affect navigation, and thus it was not necessary to obtain a permit from the Secretary for the discharge of industrial waste of that sort. That is not to say, however, that permits would be unobtainable in every case where the discharge had navigational impairment capability. The proviso simply states that the Chief of Engineers, in the exercise of his judgment, may permit certain discharges or deposits of matter which will not injure anchorage and navigation under the given circumstances, irrespective of the nature of the discharge.

suance of permits under Section 13 in compliance with Executive Order No. 11574. 36 Fed. Register 6564.[16]

Although the United States concedes in its brief (p. 30) that there was no established permit program under Section 13, it argues that an informal permit program existed. As proof of this informal program, the United States reveals, for the first time in this case, that five permits for the discharge, in its judgment, of so-called industrial waste have been issued by the Corps of Engineers since 1899, at least one of which was ac-

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16. At the time of the acts charged against PICCO in the summer of 1970, the Corps of Engineers, the agency charged with the administration and enforcement of the Rivers and Harbors Act of 1899, had published the following Regulation in the Code of Federal Regulations:

> "Section 13 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152; 33 U.S.C. 407) authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. Although the Department has exercised this authority from time to time it is considered preferable to act under Section 4 of the Rivers and Harbors Act of March 3, 1905 (33 Stat. 1147; 33 U.S.C. 419). As a means of assisting the Chief Engineers in determining the effect on anchorage of vessels, the views of the U.S. Coast Guard will be solicited by coordination with the Commander of the Local Coast Guard District." 33 C.F.R. §209.200 (e) (2).

This administrative construction is entitled to great weight in interpreting Section 13. *United States v. Republic Steel Corp.*, 362 U.S. at 491.

tually a Section 10 permit (App. Brief, p. 28, fn. 30). It is ridiculous that this case, one of such magnitude and great consequence to others, should come to rest on such a slender reed. There is absolutely no foundation in law for a presumption that PICCO should have been aware in the summer of 1970 of an "informal permit program" which resulted in the issuance of one permit once every eighteen years. Nor is there any basis for charging PICCO with knowledge of the great flurry of press releases and memoranda announcing intentions that pollution and conservation factors would be considered in passing on Section 13 permits under a program which didn't exist. PICCO was charged with knowledge of those Corps of Engineers' regulations which were duly published in the Federal Register, and not with ill-defined ideas still gestating within the Corps. The published regulations clearly stated that permits would only be issued for navigational obstructions and impediments.

It is indisputably clear that a Section 13 permit program for the industrial discharges here involved was non-existent prior to December, 1970. It is an interesting event to see the United States charge of its citizens with an offense which remained unknown, much less described, until after the offense occurred. The least one can expect is that the Government will not intentionally confuse persons with conflicting rules. PICCO was convicted for discharges which occurred on August 7 and 19, 1970. On June 13, 1970, the Justice Department transmitted Guidelines for Litigation under the Refuse Act to United States Attorneys on June 13, 1970. Those Guidelines, as reported in BNA Environment Reporter on July 17, 1970 at page 288, are as follows:

"1. *The policy of the Department of Justice with respect to the enforcement of the Refuse Act* for purposes other than the protection of the navigable capacity of our national waters, *is not to attempt to use it as a pollution abatement statute in competition with the Federal Water Pollution Control Act* or with State pollution abatement procedures, *but* rather *to use it* to supplement that Act by bringing appropriate actions either to punish the occasional or recalcitrant pollutor, or *to abate continuing sources of pollution which for some reason or other have not been subjected to a proceeding conducted by the Federal Water Quality Administration* or by a State, or where in the opinion of the Federal Water Quality Administration the pollutor has failed to comply with obligations under such a procedure. *To this end, the instructions* in Section III below *encourage United States Attorneys to use the Refuse Act to punish or prevent significant discharges, which are either accidental or infrequent, but which are not of a continuing nature resulting from the ordinary operations of a manufacturing plant.* Discharges of this last type, of course, pose the greatest threat to the environment — but it is precisely this type of discharge that the Congress created the Federal Water Quality Administration to decrease or eliminate, and it is to the programs, policies, and procedures of that Agency that we shall defer with respect to the bringing of actions under the Refuse Act." (Emphasis added.)

Either the internal memoranda or understandings between the Secretaries of the Army and Interior and press releases were never communicated to the Justice

Department, or there was deep schism between various Departments of the United States. In any case, PICCO should not be criminally prosecuted because it was unknowingly in the middle.

Accordingly, the Court of Appeals correctly held that due process was lacking in the subsequent conviction of PICCO under the rules set forth in *Connally v. General Construction Co.*, 269 U.S. 385, 391, that a criminal statute:

> [M]ust be sufficiently explicit to inform those who are subject to it that conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Mr. Justice Holmes expressed the rule another way in *McBoyle v. United States*, 283 U.S. 25, 27:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make

the warning fair, so far as possible that the line should be clear."[17]

In conclusion, the statutory and regulatory scheme which faced PICCO in the summer of 1970 was not of sufficient constitutional clarity on which to base a criminal conviction under Section 13 of the Rivers and Harbors Act of 1899. To say that the Court's decisions in *Standard Oil* and *Republic Steel* put PICCO on notice that its industrial discharges constituted criminal conduct is to require of it more imagination than is required under any notion of fair play.

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17. This is especially true where the statute purportedly covers conduct that is not inherently evil. The United States admits in its brief at page 28 that for many years the "chemical and biological content of discharged effluents was generally not regarded as particularly significant".

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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